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No. 567

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1965

THE GEORGE F. HAZELWOOD COMPANY,
A MARYLAND CORPORATION,

Appellant,

vs.

J. STANLEY PITSENBARGER, ASSESSOR
OF PENDLETON COUNTY, WEST VIRGINIA,

Appellee

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF THE STATE
OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

Joseph A. Blundon,
Henry Clay Hart, Jr.,
126 East Street,
Keyser, West Virginia,
Attorneys for the Appellant

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126 East Street,
Keyser, West Virginia,
Attorneys for the Appellant

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OPINIONS BELOW

The Circuit Court of Pendleton County, West Virginia, which was the first court of record to take cognizance of this proceeding, did not file any formal opinion herein. A copy of its final order, which contains its findings of fact, is set forth in Appendix "A" **infra.** The opinion of the Supreme Court of Appeals of West Virginia, reversing the judgment of the Circuit Court, is unofficially reported in 141 S.E.2d 314, and is also set forth in Appendix "B" **infra,** p. 20.

JURISDICTION

This proceeding was first brought by petition filed by appellant in the County Court (Board of County Commissioners) of Pendleton County, West Virginia, under Chapter 11, Article 3 of the Official Code of West Virginia (1931). Appellant sought a refund of **ad valorem** personal property taxes allegedly unlawfully assessed and collected by the Assessor of Pendleton County, West Virginia, for the first half of the year 1962, and also sought to obtain exoneration from the second half of such taxes. Appellant argued (R. 20) that Chapter 11, Article 3, Section 1 of the Official Code of West Virginia, as amended by Chapter 142 of the Acts of the West Virginia State Legislature, Regular Session, 1961, and as applied by the Assessor to the facts of this case, was repugnant to the "due process" clause of the Fourteenth Amendment to the Constitution of the United States and invalid. The

County Court refused the relief sought by appellant (R. 21), and appellant appealed to the Circuit Court of Pendleton County. After hearing, the Circuit Court reversed the ruling of the County Court on the ground, among others, that the action of the Assessor was "in violation of the 'due process' clause of the Fourteenth Amendment to the Constitution of the United States." (R. 40) (See Appendix "A", **infra**, p. 18)

The Assessor appealed to the Supreme Court of Appeals of West Virginia, which reversed the judgment of the Circuit Court and entered judgment against appellant April 6, 1965 (see Appendix "C" **infra**). A Petition for Rehearing was filed by appellant on May 5, 1965, and was refused by the Supreme Court of Appeals of West Virginia on July 19, 1965 (see Appendix "D" **infra**). Both in its original Brief (pp. 13-20) and in its Petition for Rehearing and Note of Argument in support thereof (pp. 3-15), appellant again directly and specifically raised the federal constitutional issues hereinafter stated. By its decision, the Supreme Court of Appeals of West Virginia sustained the validity of the statute and the taxes imposed under it for the year 1962, as applied to appellant and of which appellant is complaining. Notice of Appeal to this Court was filed by appellant on July 20, 1965, in the Supreme Court of Appeals of West Virginia.

Jurisdiction to review a judgment of the highest court of a state by appeal, in cases

where a state statute is drawn in question as repugnant to the Constitution of the United States, and where the decision of the highest court of that state is in favor of the validity of the statute, is conferred on this Court by 28 U.S.C.A. sec. 1257(2) and sec. 2101(c). That such jurisdiction exists under the circumstances of this case is shown by the following decisions of this Court: **Central Railroad Company of Pennsylvania v. Pennsylvania,** 370 U.S. 607, 8 L.Ed.2d 720, 82 S.Ct. 1297 (1962); **Kern-Limerick, Inc., v. Scurlock,** 347 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403 (1954); **Standard Oil Co. v. Peck,** 342 U.S. 382, 96 L.Ed. 427, 72 S.Ct. 309, 26 ALR2d 1371 (1952); **Esso Standard Oil Co. v. Evans,** 345 U.S. 495, 97 L.Ed. 1174, 73 S.Ct. 800 (1953); **United States v. Allegheny County,** 322 U.S. 174, 88 L.Ed. 1209, 64 S.Ct. 908 (1944).

STATUTE INVOLVED

Chapter 11, Article 3, Section 1 of the Official Code of West Virginia (1931) as amended by Chapter 142 of the Acts of the West Virginia State Legislature, Regular Session, 1961, insofar as relevant herein, is as follows:

"Time and Basis of Assessments; True and Actual Value; Default; Reassessment; Special Assessors.—All property shall be assessed annually as of the first day of July at its true and actual value, that is to say, at the price for which such property would sell if voluntarily offered for sale by the owner

thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale, except that the true and actual value of all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants shall be arrived at by giving primary, but not exclusive, consideration to the fair, and reasonable amount of income which the same might be expected to earn, under normal conditions in the locality wherein situated, if rented. The taxes upon all property shall be paid by those who are the owners thereof on that day, whether it be assessed to them or others . . ."

QUESTIONS PRESENTED

1. Whether or not Chapter 11, Article 3, Section 1 of the Code of West Virginia, as amended by Chapter 142 of the Acts of the West Virginia State Legislature, Regular Session, 1961, and as applied to The George F. Hazelwood Company, a Maryland Corporation, by the Assessor of Pendleton County, West Virginia, pertaining to **ad valorem** personal property taxes for the year 1962, on the facts shown by the record herein, is repugnant to and invalid under the provisions of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States?; and

2. Whether or not the State of West Vir-

ginia may, within limitations imposed by the "due process" clause of the Fourteenth Amendment to the Constitution of the United States, impose an **ad valorem** tax for a particular year on tangible personal property of a resident of another state if such property is not located in the State of West Virginia at any time during the year for which the taxes are imposed, and is in fact located, assessed and taxed in the state of the taxpayer's domicile during all of such year?

STATEMENT OF FACTS

The George F. Hazelwood Company, appellant, is a corporation organized and existing under the laws of the State of Maryland, with principal offices and place of business in the City of Cumberland, Allegany County, Maryland. During part of the year 1960 and most of the year 1961, appellant was engaged in construction contracting work for the United States Navy Department at the Naval Research Project at Sugar Grove, in Pendleton County, West Virginia. In connection with its work, appellant had large amounts of machinery and equipment located in Pendleton County until December of 1961, when its contract was completed and all of such equipment was taken back to Maryland.

Appellant was assessed for **ad valorem** personal property tax purposes by the Assessor of Pendleton County as of December 31, 1960, for the tax year 1961, and subsequently

paid that tax in full. At its regular session, 1961, the West Virginia State Legislature enacted an amendment to Chapter 11, Article 3, Section 1 of the Official Code of West Virginia (1931), moving up the assessment date for **ad valorem** property taxes for the year 1962 and subsequent years from December 31st to July 1st of the year preceding the calendar year for which the taxes are imposed. Under this new statute, the Assessor of Pendleton County sought to assess appellant's machinery and equipment again as of July 1, 1961, for purposes of 1962 taxes, and assessment forms for 1962 taxes were furnished appellant by the Assessor in January of 1962.

By letter dated January 25, 1962, which appears as part of the record herein, appellant notified the Assessor that all of the property had been removed from West Virginia in December of 1961, and objected to the proposed assessment for 1962 taxes (R. 33). Nevertheless, on January 29, 1962, the Assessor made the assessment complained of in this case (R. 33). All of the property giving rise to this assessment was kept at the domicile of appellant in the State of Maryland during the entire year 1962, and appellant was assessed and taxed thereon for the full year 1962 by Maryland (R. 40). No part of this property was in West Virginia at any time during 1962 (R. 40).

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents one clear-cut and fundamental federal constitutional issue which had never been directly passed upon by this Court or by any other court, state or federal, until the decision of the Supreme Court of Appeals of West Virginia in the instant case. This issue goes to the very essence of the nature of personal property taxation and the very essence of the jurisdiction of states to tax the tangible personal property of residents of other states. For the first time in the history of this country, so far as counsel are aware, the highest court of a state has ruled that such state has the power to assess, levy and collect an **ad valorem** tax for a particular year on tangible personal property of a resident of another state, when such property was not in the taxing state at any time during the year for which the taxes were imposed, and when such property was in fact located, assessed and taxed in the state of the taxpayer's domicile during all of such year. We submit that fundamental principles regarding the jurisdiction of states to tax tangible personal property, which have been applied again and again in the decisions of this Court, compel the conclusion that the tax in question in this case is repugnant to and invalid under the "due process" clause of the Fourteenth Amendment to the Constitution of the United States.

1. One highly significant fact shown by the record in this case is that the West Virginia

taxes here complained of, which were assessed against appellant as of July 1, 1961, were **for the calendar year 1962.** The parties are in agreement as to this point, as shown by their briefs filed in the Supreme Court of Appeals of West Virginia. The Supreme Court of Appeals expressly ruled in this very case, for the first time, that West Virginia **ad valorem** property taxes are and always have been assessed on a calendar year basis, and disapproved a dictum to the contrary in an earlier case, saying:

> ". . . after the Legislature amended the assessment statute in 1961 and placed it on a fiscal year basis, that is, from July 1 until June 30, the tax year still remained on a calendar year basis, in which manner property, both personal and real, had been assessed and taxed for many years, notwithstanding a statement contained in the case of **State ex rel. Johnston v. City of Huntington,** 71 W.Va. 106, 76 S.E. 142." See 141 S.E.2d 314, 317 and Appendix "B", **infra** pp. 25-26.

and,

> "Therefore the assessment made by the assessor of Pendleton County on the personal property of the Hazelwood Company located in Pendleton County on July 1, 1961, was for the tax year 1962. The tax assessed on this property December 31, 1960, and paid in full was for the year 1961." **Ibid.**

It is likewise undisputed that the taxes which

were assessed against appellant on this same personal property by Maryland as of January 1, 1962, were also **for the calendar year 1962.** Article 81, Section 31 (c) of the Annotated Code of Maryland of 1957 (Vol. 7 Michie's Ann. Code of Md. of 1957), under which appellant was assessed with and paid 1962 taxes thereon, is as follows:

> "(c) All State, county and/or city taxes required to be levied upon assessments made by the State Tax Commission, and **all State, county, municipal and other local taxes on tangible personal property by whomsoever assessed shall be levied for the calendar year and as of the first day of January of such year** as the date of finality." (emphasis supplied)

2. **Union Refrigerator Transit Company v. Kentucky,** 199 U.S. 194, 50 L.Ed. 150, 26 S.Ct. 36, 4 Ann. Cas. 493 (1905), involved a Kentucky property tax levied on 2000 railroad cars owned by a Kentucky corporation which were leased out for use on various railroads all over the United States, as well as in Canada and Mexico. The evidence showed that only a few of those cars were in Kentucky at any time during the tax years involved, but the Court of Appeals of Kentucky upheld the validity of the tax on all 2000 cars. This Court reversed the judgment and held that, on these facts, the tax was invalid as repugnant to the "due process" clause of the Fourteenth Amendment to the Constitution of the United States, saying:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature, and a taking of property without due process of law." **Id.**, 202, 153.

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be the compensation." **Id.**, 204, 153.

"We are of opinion that the cars in question, so far as they were located and employed in other states than Kentucky, were not subject to the taxing power of that commonwealth, and that the judgment of the Court of Appeals must be reversed." **Id.**, 211, 156.

3. In a long series of decisions, culminating in **Central Railroad Company of Pennsylvania v. Pennsylvania,** 370 U.S. 607, 8 L.Ed.2d 720, 82 S.Ct. 1297 (1962), this Court has held firmly to the rule of the **Union Refrigerator Transit Company** case, **supra.** In the **Central Railroad Company** case, **supra.,** this Court struck down a Pennsylvania property tax assessed against a Pennsylvania corporation insofar as the same applied to certain railroad cars which were shown to have been located in New Jersey throughout the tax years involved, as constituting a taking of the taxpayer's property without due process of law. See also **Frick v. Pennsylvania,** 268 U.S. 437, 487-496, 69 L.Ed. 1058, 1061-1065, 45 S.Ct. 603, 42 ALR 316 (1925), where this Court held that the state of a decedent's domicile may not levy an inheritance tax on tangible personal property owned by the decedent but located in another state.

4. In some cases, such as **Ott v. Mississippi Barge Line Company,** 336 U.S. 169, 93 L.Ed. 585, 69 S.Ct. 432 (1949), this Court has upheld state property taxes where states **other** than the taxpayer's domicile levied taxes based on a percentage of the value of the tax-

payer's tangible personal property equivalent to the percentage of the tax year which such property is shown to have spent within the taxing state, or on some similar reasonable apportionment formula, saying:

> "So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits and protection afforded by the taxing state. (citation omitted) Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state." **Id.,** at 174, 589; see also **Standard Oil Company v. Peck,** 342 U. S. 382, 96 L.Ed. 427, 72 S.Ct. 309, 26 ALR2d 1371 (1952)

This Court also said, in the latter case:

> "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. (citation omitted) Otherwise there would be **multiple taxation** of interstate operations and the tax would have no relation to the opportunities, benefits or protection which the taxing state gives those operations." **Id.,** at 384-5, 430 (emphasis supplied)

However, so far as counsel are aware, neither this Court nor any other court, state or federal, had ever held that one state may tax property of a resident of **another state** for a particular year, when such property was not

within the borders of the taxing state at any time during that year, until the decision of the Supreme Court of Appeals of West Virginia herein appealed from.

5. The Supreme Court of Appeals of West Virginia said, in reversing the ruling of the Circuit Court in this case:

> "Although the personal property of the Hazelwood Company has been taxed by **both** West Virginia and Maryland **for the same year,** there is no constitutional inhibition against such taxation." 141 S.E.2d 314, 318 and Appendix "B" p. 29 (emphasis supplied)

and,

> "The State of Maryland had the power to tax the property in question because it was located within its jurisdiction at the domicile of the owner on January 1, 1962, at which time such property was apparently assessed for taxation. West Virginia had the power to tax the same property because it was located in West Virginia on July 1, 1961, which was the time the Legislature had fixed to determine a tax situs in West Virginia for 1962 taxes and had provided that the tax upon such property shall be paid by the owners thereof for property located in West Virginia on July 1, 1961," **Ibid.**

This case presents a clear-cut example of multiple taxation, and the Supreme Court of Ap-

peals of West Virginia has expressly ruled that multiple taxation is permissible on these facts. We submit that the holdings of this Court in the cases above cited and the holding of the Supreme Court of Appeals of West Virginia in the case at bar are in direct conflict. Unless and until this conflict is resolved by this Court, the decision here appealed from will remain among the published reports and will tend to create doubt and confusion among the lawyers, judges and state and local taxing authorities of this country. This is a question of substantial importance, which affects every state, and can be settled only by a decision of this Court, after plenary consideration.

CONCLUSION

For the reasons above stated, we respectfully submit that, although the amount of money directly involved herein is small, such money has been taken from appellant without due process of law. Moreover, the constitutional questions presented by this appeal are substantial and are of public importance. Therefore probable jurisdiction should be noted and this appeal should be given plenary consideration by this Court.

Respectfully submitted,

Joseph A. Blundon,
Henry Clay Hart, Jr.

126 East Street
Keyser, West Virginia.
Attorneys for the Appellant

APPENDIX "A"

Final Order and Findings of Fact of the Circuit Court of Pendleton County, West Virginia, entered February 4, 1964

This matter came on to be heard this the 4th day of February, 1964, before this Court, the Honorable H. Gus Muntzing, Judge, presiding, and came the George F. Hazelwood Company, a corporation, Petitioner, by Henry Clay Hart, Jr., of Blundon and Hart, as its attorneys, and came also J. Stanley Pitsenbarger, Assessor of Pendleton County, Respondent, in person and by George Sponaugle, Prosecuting Attorney of Pendleton County, West Virginia, and there came on to be heard the Petition of George F. Hazelwood Company, a corporation, Petitioner, in which said Petitioner appeals from a ruling of the County Court of Pendleton County, West Virginia, refusing the Petition filed by Petitioner with said County Court seeking a refund of personal property tax paid by Petitioner for the first half of the year 1962, and seeking abatement of personal property taxes assessed against Petitioner for the second half of the year 1962, on the ground that such taxes were erroneously assessed and collected, as more particularly set forth in said Petition.

It appears to the Court that the entire record of proceedings taken and had before the County Court of Pendleton County has been properly transmitted to this Court for pur-

poses of a hearing on this Petition, and said record, consisting of Petitioner's legally verified Petition filed before the County Court, a Letter of Opinion from the office of the State Tax Commissioner, which was presented to and considered by the said County Court, and the Order of the County Court entered on the 11th day of February, 1963, is now ordered made a part of the record in this Court in this proceeding.

The Court then heard testimony from the following duly sworn witnesses: J. Stanley Pitsenbarger, Assessor of Pendleton County, B. H. Mitchell, Deputy Assessor of Pendleton County, and the parties by counsel examined the said witnesses, all of which was taken down in shorthand characters, and certain stipulations were entered into by counsel for the parties, and the Court heard argument of counsel, all of which are now ordered transcribed and filed and made a part of the record herein.

From all of the foregoing matters, being maturely considered, the Court makes the following findings:

1. Petitioner is a corporation duly organized and existing under the laws of the State of Maryland with principal offices and place of business in the City of Cumberland, Allegany County, Maryland, and performed certain work at Sugar Grove, Pendleton County, West Virginia, during the years 1960 and

1961, and had certain items of tangible personal property in Pendleton County, West Virginia, until the month of December, 1961, at which time all of said personal property was removed from said County and State of West Virginia to Allegany and Garrett Counties in the State of Maryland; and

2. Said personal property of the Petitioner was assessed for personal property tax purposes by the Assessor of Pendleton County for the year 1961, and such tax has been paid; and

3. As of July 1, 1961, said Assessor assessed said personal property for the tax year 1962, in accordance with Chapter 11, Article 3, of the Code of West Virginia, as amended by the Acts of the West Virginia State Legislature of 1961, which changed the date of assessment for tax purposes from December 31st to July 1st; and

4. The Petitioner has paid to the Sheriff of Pendleton County the sum of Six Hundred Eighty-four and 38/100 Dollars ($684.38), representing the first half of taxes assessed upon said personal property for the year 1962, and a like amount is claimed by said Assessor to be due, owing and unpaid; and

5. Petitioner's personal property was not located in the State of West Virginia at any time during the year 1962 but was located and also assessed for personal property tax purposes in the State of Maryland for the full year 1962.

The Court is of opinion that in enacting the amendments to the West Virginia property tax law at the 1961 regular session of the Legislature, the Legislature did not intend to create any tax inequality or to impose any special burden on those who might remove personal property from West Virginia during the period from July 1, 1961, to December 30, 1961. In this case the Petitioner paid its taxes to the State of West Virginia for the full year 1961, and removed its property from West Virginia before the end of 1961, such property being assessed and taxed in Maryland for the full year 1962, and having no tax situs in West Virginia during any part of the year 1962. The effect of this assessment on this Petitioner would be to subject its property to double assessment and hence to double taxation with respect to the same period of time, that is to say the year 1961, in violation of the uniform taxation provisions of Article 10, Section 1, of the Constitution of West Virginia, and in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

For these reasons, the Court holds that the assessment of Petitioner's personal property by the Assessor of Pendleton County for the year 1962, upon the facts shown in the record herein, was erroneous and unlawful, and it is, therefore, the order and judgment of the Court that the Sheriff of Pendleton County shall refund to the Petitioner the sum of Six

Hundred Eighty-four and 38/100 Dollars ($684.38), without interest, which has been paid by said Petitioner and that said Petitioner be and it is hereby exonerated from the payment of taxes for the second half of 1962, to all of which the Respondent-Appellee, the Assessor of Pendleton County, objects and excepts.

It is the further order of the Court that execution of this Order shall be stayed for a period of sixty (60) days hereafter to permit the Respondent to prosecute an appeal herefrom to the Supreme Court of Appeals of West Virginia, as the Respondent so desires.

Enter:

/s/ H. G. Muntzing
Judge

APPENDIX "B"

Opinion of the Supreme Court of Appeals of West Virginia, filed April 6, 1965

GEORGE F. HAZELWOOD, COMPANY
a Corporation

v.

J. STANLEY PITSENBARGER, Assessor

No. 12360

Supreme Court of Appeals of West Virginia

Submitted Jan. 26, 1965,
Decided April 6, 1965

SYLLABUS BY THE COURT

1. The Legislature has the power to fix the time at which property within its jurisdiction may be assessed.

2. Personal property that has never been located within a state and over which the state has no power or control, or which is only temporarily within the state, can not be assessed or taxed by such state, but if it has been located within the jurisdiction of a state for a period of time and used therein, may acquire a tax situs and be assessed on any day fixed by the Legislature; and the tax is determined thereby, even though the property is removed from the state before the tax is due or even before it has actually been assessed.

3. Tangible personal property which has acquired a tax situs retains such status until it is removed from the jurisdiction of the state in which it has acquired a tax situs, and the mere intention or determination to move such property is not sufficient for the state in which it was located at the time the tax situs was established and the property assessed to lose its power to tax such property. It must be actually moved before the assessment date fixed by the Legislature.

4. Both the state of the domicile of the owner of personal property and a state in which such property was located can tax the property if it is located in each state on the assessment date fixed by the Legislature even though the tax is for the same year.

5. All property in West Virginia is assessed annually on the first day of July against the owner of the property at that time, but the personal property must be located in the state each year at the time it is assessed.

George I. Sponaugle, Pros. Atty., Franklin, for plaintiff in error.

Blundon and Hart, Joseph A. Blundon, Henry Clay Hart, Jr., Keyser, for defendant in error.

BERRY, Judge.

This is an appeal from a judgment of the Circuit Court of Pendleton County, West Vir-

ginia, entered on February 4, 1964, holding that the assessment of personal property owned by the George F. Hazelwood Company, a Corporation, by the assessor of Pendleton County for the year 1962 was erroneous and unlawful, and granting relief prayed for by said corporation for a refund of taxes paid by it on said property for the first half of 1962 and exonerating said corporation from the payment of taxes for the second half of 1962. This Court granted an appeal from said judgment on July 13, 1964, and the case was submitted for decision on arguments and briefs at the January Term.

The George F. Hazelwood Company, a Corporation, the petitioner below, is a foreign corporation organized and existing under the laws of the State of Maryland, with its principal office and place of business in Cumberland, Allegany County, Maryland, and qualified to do business in the State of West Virginia. In 1960 it moved heavy equipment valued at approximately $91,000.00 into Pendleton County, West Virginia. During the year 1960, and almost the entire year of 1961, this Company was engaged in construction work at the Naval Research Project at Sugar Grove, Pendleton County, West Virginia, under a contract with the United States Navy Department. This work was completed, and some time in December, 1961, all of the heavy equipment of the Company was moved back to its principal place of business in Cumberland,

Maryland. The assessor of Pendleton County assessed the personal property of this Company in Pendleton County on December 31, 1960, for 1961 taxes, as required by the laws of West Virginia at that time. The taxes for the year 1961 were paid in full by the Company. At the 1961 Regular Session of the West Virginia Legislature, Code, 11-3-1, dealing with the assessment of personal property, was again amended and provided that all such property should be assessed annually as of the first day of July at its true and actual value, and that such taxes upon all such property should be paid by the owners thereof on that day. Under the provisions of the amended statute in question, the assessor of Pendleton County assessed for 1962 taxes the Hazelwood Company's personal property located on July 1, 1961, in the State of West Virginia. The Hazelwood Company advised the assessor of Pendleton County that all of its personal property had been removed from West Virginia in December, 1961, and objected to the assessment of such property for the year 1962 taxes. Likewise, the Company protested to the State Tax Commissioner who replied that the assessment date, but not the tax year, had been changed. Notwithstanding the objection of the Hazelwood Company to the assessment, such assessment was actually made on said property for 1962 taxes by the assessor on January 29, 1962, for such property as was located in the State of West Virginia on July 1, 1961. All of the Hazelwood Company's

property, consisting of heavy machinery and equipment involved in the assessment by the assessor of Pendleton County, was located and kept in the State of Maryland during the entire year of 1962, and the Hazelwood Company was assessed and taxed thereon for the full year by the State of Maryland. The Hazelwood Company paid to the Sheriff of Pendleton County, West Virginia, the first half of the 1962 taxes in the amount of $684.38, such being its assessment for personal property in West Virginia, and then filed a petition in the County Court of Pendleton County, West Virginia, to obtain a refund for the first half of 1962 taxes paid by it, and for an exoneration from the payment of taxes for the second half of the year 1962.

The hearing was held before the County Court of Pendleton County upon the petition filed therein in connection with this matter, and on February 11, 1963, an order was entered by said Court denying the relief prayed for in its petition.

On March 5, 1963, the George F. Hazelwood Company filed a petition in the Circuit Court of Pendleton County, West Virginia, appealing from the order entered by the County Court of Pendleton County and praying that said order be reversed. On February 4, 1964, a hearing on said petition was held by the Judge of the Circuit Court of Pendleton County and an order was entered reversing the ruling of the County Court of Pendleton

County and holding that even though the personal property of the Hazelwood Company was located in Pendleton County, West Virginia, on July 1, 1961, it had no tax situs in West Virginia during the year 1962, and that it was erroneously and unlawfully assessed. This order directed the sheriff of Pendleton County to refund the first half of the 1962 taxes paid to Pendleton County and exonerated said Company from the payment of taxes on such personal property for the second half of the year 1962.

It is contended in this appeal that the judgment of the Circuit Court of Pendleton County is erroneous and not supported by the law applicable in such cases.

It is the contention of the appellee Hazelwood Company that the Legislature did not intend by the 1961 tax amendment to impose a tax for the calendar year 1962 on property already taxed for 1961 which was not within the state during the year 1962, and if it was so intended, that such tax would be unconstitutional because such property did not have a tax situs in West Virginia during any part of the year 1962, and was, in fact, located, assessed and taxed during such year at the domicile of the taxpayer. It is conceded by the appellee in this proceeding that after the Legislature amended the assessment statute in 1961 and placed it on a fiscal year basis, that is, from July 1 until June 30, the tax year still remained on a calendar year basis, in which

manner property, both personal and real, has been assessed and taxed for many years, notwithstanding a statement contained in the case of **State ex rel. Johnston v. City of Huntington,** 71 W.Va. 106, 76 S.E. 142.

This question is discussed in 60 West Virginia Law Review, on page 271 by Professor Londo H. Brown. It is pointed out there that if taxes are not based on a calendar year after the 1961 tax amendment changing the assessment date, it would result in either an overlapping assessment or a gap of six months in 1962 during which time no taxes could be imposed. It can certainly be said that the Legislature did not intend to have either event occur by virtue of the amendment. Professor Brown's article deals with the taxation of real property under the provisions of Code, 11A-1-2, as amended by the Legislature in 1961, which provides that a lien shall attach on the assessment date, July 1, 1961, and on July 1 of each year thereafter, for the taxes "payable for the ensuing fiscal year." This language is not in Code, 11-3-1, which deals with the assessment of the property and there is no specific section relative to the year for which the taxes on personal property are payable, but the sections are in the same chapter dealing with taxation of personal and real property and should be read together. See Code, 11A-1-1, as amended, which says that "taxes" as used in Chapter 11A refers to both real and personal levies unless otherwise specified. It would not be possible under the pres-

ent law in this state to have two tax years for real and personal property. It is true that there is no lien denominated as such on personal property after assessment thereof for taxation, but Code, 11A-2-3, as amended, provides that the sheriff may distrain for delinquent "taxes" any goods and chattels belonging to a person assessed, and Code, 11A-2-5, as amended, provides for applying the distraint to collect taxes assessed against goods and chattels, even though they have been transferred to another person. It is difficult to see any practical difference between this and a lien.

It would appear that the intention of the amendment to the assessment statute was to give the assessors more time in which to make their assessments in order that they could be completed in time for the use of the levying authorities before the beginning of the fiscal year. The practical effect of this amendment as applied by the officials who are charged with its administration has been to allow the levies and budgets to be made before the beginning of the fiscal year and the collection of taxes to be made two months sooner than they were made before, without any overlap or gap. The interpretation of the amended statute in question dealing with assessment and taxes by the officers whose duty it is to administer it as indicated above should be given great weight in the construction of the statute. 17 M.J., **Statutes,** Section 58. Therefore, the assessment made by the assessor of Pen-

dleton County on the personal property of the Hazelwood Company located in Pendleton County on July 1, 1961, was for the tax year 1962. The tax assessed on this property December 31, 1960, and paid in full was for the year 1961. The exception contained in Code, 11-3-30, as amended, preserving the former law as to 1961, while inaptly expressed, merely means that the law pertaining to assessments and tax payment in effect on January 1, 1961, before the amendment, would be applicable to and govern the assessments already made and taxes yet to be paid for the year 1961. The exception has no bearing on the case at bar because the first assessment was made and the taxes for 1961 accrued following the provisions of the law before it was amended.

It is well settled that a Legislature of a state has the power to fix the time at which property within its jurisdiction may be assessed. 51 Am.Jur., **Taxation,** Section 441; 84 C.J.S. **Taxation** 60; **Hammond Lumber Co. v. Smart,** 129 La. 945, 57 So.277, 38 L.R.A., (N.S.) 856 et seq. Personal Property that has never been located within a state and over which the state has no power or control or which is only temporarily within the state cannot be assessed and taxed by such state, but if it has been located within the jurisdiction of the state for a period of time and used therein it may acquire a tax situs and be assessed on any day fixed by the Legislature and the tax is determined thereby, even though the property is

removed from the state before the tax is due or even before the assessor actually entered his figures. 51 Am.Jur., **Taxation,** Section 442; **San Gabriel Valley Land & Water Co. v. Witmer Bros. Co.,** 96 Cal. 623, 29 P. 500, affirmed on rehearing, 31 P. 588, 18 L.R.A. 465. It has been specifically held that property may be assessed six months before the tax year. **Muskogee County v. United States,** 10 Cir., 133 F.2d 61. Tangible personal property which has acquired a tax situs retains such status until it is removed from the jurisdiction of the state in which it has acquired such tax situs, and the mere intention or determination to move such property is not sufficient to cause the state in which it was located at the time the tax situs was established and the property assessed, to lose its power to tax such property. It must be actually moved before the assessment date fixed by the Legislature. 84 C.J.S. **Taxation** 115; **State v. Crown Central Petroleum Corp.,** Tex-Civ-App., 242 S.W.2d 457.

Although the personal property of the Hazelwood Company has been taxed by both West Virginia and Maryland for the same year, there is no constitutional inhibition against such taxation. Generally, to constitute double taxation there must be an identity of taxing authority, taxing period, taxing purpose, and person and property taxed; and even then there are exceptions resulting from constitutional provisions not necessary to discuss here. 51 Am.Jur., **Taxation,** Sections

284, 285. Many constitutions do not prohibit per se double taxation, and cases striking it down have generally relied on "equal and uniform" clauses.

The State of Maryland had the power to tax the property in question because it was located within its jurisdiction at the domicile of the owner on January 1, 1962, at which time such property was apparently assessed for taxation. West Virginia had the power to tax the same property because it was located in West Virginia on July 1, 1961, which was the time the Legislature had fixed to determine a tax situs in West Virginia for 1962 and had provided that the tax upon such property shall be paid by the owners thereof for property located in West Virginia on July 1, 1961. Code 11-3-1, as amended.

It has been held in a similar case that both the State of Texas, the domicile of the owner of the property, and the state of Louisiana, into which State the property was moved, could tax the personal property, it having acquired a tax situs for the same year. **Griggsby Construction Company v. Freeman,** 108 La. 435, 32 So. 399, 58 L.R.A. 349. This question is discussed in 51 Am.Jur., **Taxation,** Section 450, wherein it is stated: "As a matter of constitutional power, a state which otherwise has the right to tax personal property is not deprived thereof by the fact that the property is subject to taxation, or that a tax has actually been paid thereon, in another state for the same period."

The statutory assessment date determines the taxability of property and not the actual date the assessment is made. **United Telephone Mutual Aid Corporation v. State of North Dakota,** 87 N.W.2d 54.

It is the contention of the appellee that inasmuch as the sole basis for the power of West Virginia to tax the property in question for 1962 is because such property was in West Virginia on July 1 of the preceding year, it would follow that West Virginia could have also lawfully assessed the same property for 1963 taxes on July 2, 1961, and for 1964 taxes on July 3, 1961, and continue so to do for any number of years in the future, regardless of whether the property was in West Virginia the years for which such taxes were assessed. This could not be done because of the wording of the statute pertaining to the assessment of such property. The statute, Code, 11-3-1, as amended, provides that all property shall be assessed annually on the first day of July and the law requires the property to be in the state at the time it is assessed. All property must be assessed annually because the value changes and any attempt to assess property for taxation in future years when the property was not located in the taxing state could not be upheld for many reasons.

It should be pointed out that the property in question was brought into West Virginia in 1960 and was not in West Virginia on December 31, 1959, when assessment was made

on such property and therefore the Hazelwood Company was not assessed or taxed for its personal property in West Virginia during the year 1960. Therefore, it can be seen that the application of the assessment and tax laws in this state, before and after the 1961 amendment tended to equalize and compensate in relation to the taxes in question and was not an unjust burden as asserted by the appellee.

For the reasons stated herein, the judgment of the Circuit Court of Pendleton County is reversed.

Reversed.

APPENDIX "C"

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 6th day of April, 1965, the following order was made and entered, to-wit:

In the Matter of the George F. Hazelwood Company, a corporation

George F. Hazelwood Co., a corporation,
Plaintiff Below, Defendant in Error

vs. No. 12360

J. Stanley Pitsenbarger, Assessor of Pendleton County,
Defendant Below, Plaintiff in Error

Upon a writ of error to a judgment of the Circuit Court of Pendleton County, rendered on the 4th day of February, 1964.

The Court, having maturely considered the transcript of the record herein and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in said judgment. It is therefore considered and ordered by the Court that the judgment of the Circuit Court of Pendleton County rendered in this case on the 4th day of February, 1964, be, and the same is hereby set aside, reversed and annulled, and that the plaintiff in error do

recover of and from the defendant in error his costs about the prosecution of his writ of error in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Pendleton County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Judge Berry, was concurred in by Judges Browning, Haymond, Calhoun and Caplan.

A True Copy

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX "D"

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 19th day of July, 1965, the following order was made and entered, to-wit:

In the Matter of the George F. Hazelwood Company, a corporation

George F. Hazelwood Company, a corporation,
Plaintiff Below, Defendant in Error

vs. No. 12360

J. Stanley Pitsenbarger, Assessor of Pendleton County, Defendant Below, Plaintiff in Error

The Court, having maturely considered the petition for rehearing and reargument filed in this case, is of opinion to, and doth hereby deny the prayer of the petition, and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals